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# OFFICE OF THE ATTORNEY GENERAL



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Honorable Larry D. Dixon  
State Senator, 25th District  
820 East Fairview Avenue  
Montgomery, AL 36106

Judgements - Interest -  
Interest Rates - Loans

Section 8-8-8 provides  
prejudgement interest to be  
collected on contracts  
expressed or implied provided  
the amount due and its due  
date is certain or subject to  
computation. Section 8-8-1 by  
inference sets the  
prejudgement rate at 6% on  
oral contracts and 8% on  
written contracts that are  
silent as to such interest.

Dear Senator Dixon:

This opinion is issued in response to your request for an  
opinion from the Attorney General.

#### QUESTION

Can a collection agency add "prejudgement interest of 5% to  
the amount it seeks to collect "where no written contract  
controls?" You noted in your letter that § 8-8-1 of the Alabama  
Code states that the maximum rate of interest upon the loan or  
forbearance of money, goods or things in actions, except by  
written contract, is \$6.00 upon \$100.00 for one year.

FACTS AND ANALYSIS

Section 8-8-1 provides as follows:

"Except as otherwise provided by law, the maximum rate of interest upon the loan or forbearance of money, goods or things in action, except by written contract is \$6.00 upon \$100.00 for one year, and the rate of interest by written contract is not to exceed \$8.00 upon \$100.00 for one year and at that rate for a greater or less sum or for a longer or shorter time."

This section has been superseded in scope with respect to written contracts, as you are aware, by the Small Loan Act, by the Mini-Code, and by § 8-8-5 of the Alabama Code which provides that any person, etc., may agree to pay any rate or rates of interest for the loan or forbearance of money or for any credit sale as they may agree to pay provided the loan or forbearance or credit sale involves an original principal balance of \$2,000.00 or more. This being the case, § 8-8-1 presently applies only to "the loan or forbearance, goods or things in action" when there is no written agreement and the original principal amount is less than \$2,000.00.

Section 8-8-1 is a limitation on the amount of interest that can be charged. It does not provide for additional interest to be added to an agreement after the fact. Consequently, unless the parties have orally agreed to the payment of interest, not to exceed the 6% limitation, no right to the interest arises which can be enforced by anyone, whether a collection agency or an attorney. Section 8-8-1 does not provide for "prejudgement interest" not previously agreed to by the parties. However, if the parties orally agreed to "prejudgement interest" the amount would be usurious pursuant to § 8-8-1, if the agreed upon amount exceeded 6%.

Attorneys differ from collection agents in that when they go to court they prove facts and through the proof of facts establish the actual terms of the agreement and the actual damages due for breach of contract or otherwise. Once they meet their burden of proof then the proper amount of damages, as determined by the finder of fact, whether it be judge or jury, is reduced to judgement and the judgement is thereafter collectable by garnishment and attachment. Collection agents cannot represent

parties in court, nor can they collect judgements by garnishment or attachment. To the extent that attorneys receive attorney's fees in connection with a collection action, they either receive attorney's fees as a percentage of the amount collected, by agreement with their client, or they receive attorney's fees awarded by the court if the contract so provides.

Section 8-8-8 of the Alabama Code addresses prejudgement interest. Section 8-8-8 provides as follows:

"All contracts, expressed or implied, for the payment of money, or other thing, or for the performance of any act or duty bear interest from the day such money, or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation therefore in money, performed."

Under this section, if the amount due under the contract, whether expressed or implied, including an open account, is certain or can be estimated as having a certain money value, then interest accrues by law, and therefore may be collected by a collection agency or for that matter the creditor or the creditor's attorney by demand. Under this section prejudgement interest runs only on such sums as are certain or are capable of being made certain by mere computation. There are many cases to be found which deal with whether or not an amount claimed under a contract is a "sum certain." This determination is inevitably fact oriented. Therefore, a collection agent might be assuming a significant risk by making a fact determination and then attempting to collect prejudgement interest under this section. They could later be found to have attempted to collect an amount not owed. Risk would exist under general tort law and under the Fair Debt Collection Practices Act. Such risk does not exist for an attorney, functioning as an attorney and not as a collection agent, because the attorney will be filing an action in court and will be proving the facts and in so doing will establish one way or another whether the prejudgement interest is appropriate.

Section 8-8-8, unfortunately, does not provide for a specific amount of interest. It would seem that the 6% upon oral contract limitation, and the 8% upon written contract limitation of § 8-8-1 would apply. Miller and Company, Inc. v. John W. McGown, et al, 531 So2d 888 (Ala. 1988).

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CONCLUSION


Section 8-8-8 provides prejudgement interest to be collected on contracts expressed or implied provided the amount due and its due date is certain or subject to computation. Section 8-8-1 by inference sets the prejudgement rate at 6% on oral contracts and 8% on written contracts that are silent as to such interest.

I hope this sufficiently answers your question. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

JIMMY EVANS  
Attorney General

By:

  
JAMES R. SOLOMON, JR.  
Chief, Opinions Division

JE/TRS/brh